

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

JAMES M. MILLIKEN,

Plaintiff,

vs.

S. ALFARO, et al.,

Defendants.

1:20-cv-00963-DAD-GSA-PC

**FINDINGS AND RECOMMENDATIONS
TO DISMISS CASE FOR FAILURE TO
OBEY COURT ORDER
(ECF No. 19.)**

**OBJECTIONS DUE WITHIN FOURTEEN
DAYS**

I. FINDINGS

James M. Milliken (“Plaintiff”) is a state prisoner proceeding *pro se* with this civil rights action pursuant to 42 U.S.C. § 1983. On July 6, 2020, Plaintiff filed the Complaint commencing this action. (ECF No. 1.)

On February 28, 2022, the Court screened the Complaint and issued an order dismissing it for failure to state a claim, with leave to amend within thirty days. (ECF No. 19.) The thirty day time period has now expired, and Plaintiff has not filed an amended complaint or otherwise responded to the Court's order.

In determining whether to dismiss this action for failure to comply with the directives set forth in its order, “the Court must weigh the following factors: (1) the public’s interest in

1 expeditious resolution of litigation; (2) the court’s need to manage its docket; (3) the risk of
2 prejudice to defendants/respondents; (4) the availability of less drastic alternatives; and (5) the
3 public policy favoring disposition of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d 639,
4 642 (9th Cir. 2002) (citing Ferdik v. Bonzelet, 963 F.2d 1258, 1260-61 (9th Cir. 1992)).

5 “The public’s interest in expeditious resolution of litigation always favors dismissal,” id.
6 (quoting Yourish v. California Amplifier, 191 F.3d 983, 990 (9th Cir. 1999)), and here, the action
7 has been pending since July 6, 2020. Plaintiff’s failure to respond to the Court’s order may reflect
8 Plaintiff’s disinterest in prosecuting this case. In such an instance, the Court cannot continue to
9 expend its scarce resources assisting a litigant who will not help himself by litigating his lawsuit.
10 Thus, both the first and second factors weigh in favor of dismissal.

11 Turning to the risk of prejudice, “pendency of a lawsuit is not sufficiently prejudicial in
12 and of itself to warrant dismissal.” Id. (citing Yourish at 991). However, “delay inherently
13 increases the risk that witnesses’ memories will fade and evidence will become stale,” id., and it
14 is Plaintiff’s failure to file an amended complaint that is causing delay. Therefore, the third factor
15 weighs in favor of dismissal.

16 As for the availability of lesser sanctions, at this stage in the proceedings there is little
17 available to the Court which would constitute a satisfactory lesser sanction while protecting the
18 Court from further unnecessary expenditure of its scarce resources. Plaintiff is a prisoner
19 proceeding *pro se* with this action, making monetary sanctions of little use, and given the early
20 stage of these proceedings, the preclusion of evidence or witnesses is not available. However,
21 inasmuch as the dismissal being considered in this case is without prejudice, the Court is stopping
22 short of issuing the harshest possible sanction of dismissal with prejudice.

23 Finally, because public policy favors disposition on the merits, this factor will always
24 weigh against dismissal. Id. at 643.

25 **II. RECOMMENDATIONS AND CONCLUSION**

26 Accordingly, the Court **HEREBY RECOMMENDS** that:

27 1. This action be dismissed, without prejudice, based on Plaintiff’s failure to obey
28 the Court’s order of February 28, 2002; and

2. The Clerk be directed to close this case.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within **fourteen (14) days** from the date of service of these findings and recommendations, Plaintiff may file written objections with the court. Such a document should be captioned “Objections to Magistrate Judge’s Findings and Recommendations.” Plaintiff is advised that failure to file objections within the specified time may result in the waiver of rights on appeal. Wilkerson v. Wheeler, 772 F.3d 834, 839 (9th Cir. 2014) (citing Baxter v. Sullivan, 923 F.2d 1391, 1394 (9th Cir. 1991)).

IT IS SO ORDERED.

Dated: **April 29, 2022**

/s/ Gary S. Austin

UNITED STATES MAGISTRATE JUDGE